No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

04-5323

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

Supreme Court U.S.
FILED
JUL 19 2004

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner LaRoyce Lathair Smith, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Smith has previously been granted leave to proceed *in forma pauperis* in the Texas Court of

JUL 21 2004

Criminal Appeals on direct appeal and during state habeas proceedings, as well as in the District Court of the Northern District of Texas. Nonetheless, as Smith seeks review of the decision of a state court, an affidavit of indigency is attached.

Wherefore, Petitioner asks the Court to grant him leave to proceed *in forma pauperis* in filing this petition for a writ of certiorari.

Respectfully submitted,

Jordan Steiker by Maurie Levin w/express permission

Jordan Steiker*
727 East Dean Keeton
Austin, TX 78705
(512) 232-1346
(512) 471-6988 - fax

Maurie A. Levin
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, Virginia 22903
(434) 817-2970
(434) 817-2972 - fax

Counsel for LaRoyce Lathair Smith

* Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LaRoyce Lathair Smith **Petitioner,** **vs.** **Doug Dretke, Director,** **Texas Department of Criminal** **Justice, Institutional Division** **Respondent.**	**CIVIL ACTION** **NO. _____**

DECLARATION IN SUPPORT OF REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, LaRoyce Lathair Smith, declare, depose, and say that I am the plaintiff in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to relief.

I further declare that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes __ No ✓

a. If you answered **YES**, state the amount of your salary or wages per month, and give the name and address of your employer.

_____

_____

_____

b. If you answered **NO**, state the date of last employment and the amount of the salary and wages per month which you received.

1990 minimum wage car wash

_____

_____

2. Have you received, within the past 12 months, any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No ✓
b. Rent payments, interest or dividends? Yes ___ No ✓
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes ✓ No ___
e. Any other sources? Yes ___ No ✓

If you answered **YES** to any of the questions above describe each source of money and state the amount received from each during the past 12 months.

FRIENDS $600.00 - $800.00

3. Do you own cash, or do you have money in a checking or savings account, including any funds in prison accounts?

Yes ✓ No ___

If you answered **YES**, state the total value of the items owned.

Inmate trust fund SEE attached

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing?

Yes ___ No ✓

If you answered **YES**, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support; state your relationship to those persons (father, mother, spouse, etc.); and indicate how much you contribute toward their support.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Signed this 16th day of July, 04.

Lakeya L. Smith
Signature of Plaintiff

I hereby certify that the plaintiff herein has the sum of $ 207.36 on account to his/her credit at the Polunsky Unit-TDCJ institution where he/she is confined.

I further certify that the plaintiff likewise has the following securities to his/her credit according to the records of said _____ institution:

CHRISTY PUTNAM
NOTARY PUBLIC STATE OF TEXAS
My Commission Expires: 01-27-2008

Notary without Bond

Authorized Officer of Institution

No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

LAROYCE LATHAIR SMITH,
Petitioner,
v.
STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel for LaRoyce Lathair Smith, that on July 19, 2004, I caused the foregoing Motion for Leave to Proceed *in Forma Pauperis* to be served by U.S. mail on the Hon. Bill Hill, Dallas County District Attorney, Attn: Katherine Drew, Appellate Section, Office of the Dallas District Attorney, Frank Crowley Courts Building, 133 N. Industrial Blvd., Dallas, TX 75207, telephone 214-653-3625; and that all parties required to be served have been served.

Maurie A. Levin
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, Virginia 22903
(434) 817-2970

Counsel for LaRoyce Lathair Smith

No. 03-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Jordan Steiker*
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1346

Maurie Levin
Virginia Capital Representation Resource Center
2421 Ivy Road, Suite 301
Charlottesville, Virginia 22903
(434) 817-2970

* Counsel of Record

Capital Case

QUESTIONS PRESENTED

I.

Can the decision of the Texas Court of Criminal Appeals denying Petitioner relief under *Penry v. Lynaugh*, 492 U.S.302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), because his mitigating evidence did not constitute a uniquely severe permanent handicap with a nexus to his crime survive this Court's intervening decision in *Tennard v. Cockrell*, 542 U.S. ---, 124 S. Ct. 2059 (2004)?

II.

Is *Penry II* satisfied by a nullification instruction that clearly informs jurors of the obligation to answer sentencing questions dishonestly in order to give effect to constitutionally relevant mitigating evidence?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

COURSE OF PROCEEDINGS BELOW 2

STATEMENT OF THE CASE 3

HOW THE ISSUES WERE DECIDED BELOW 8

REASONS FOR GRANTING CERTIORARI 13

1. MR. SMITH'S EVIDENCE OF LIMITED MENTAL ABILITIES AND HIS TURBULENT BACKGROUND COULD NOT BE GIVEN ADEQUATE MITIGATING EFFECT VIA THE OLD TEXAS SPECIAL ISSUES AND THE TEXAS COURT OF CRIMINAL APPEALS' CONTRARY CONCLUSION IS WHOLLY UNDERCUT BY THIS COURT'S SUBSEQUENT DECISION IN *TENNARD V. DRETKE*, 542 U.S. ---, 124 S. CT. 2059 (2004). 13

2. THE NULLIFICATION INSTRUCTION IN MR. SMITH'S CASE WAS INDISTINGUISHABLE FROM THE INSTRUCTION CONDEMNED IN *PENRY V. JOHNSON*, 532 U.S. 782 (2001) (*PENRY II*) AND THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO CREDIT THIS COURT'S ARGUMENTS IN *PENRY II* REQUIRES THIS COURT'S INTERVENTION. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Federal Cases

Atkins v. Virginia, 536 U.S. 304 (2002) *10*

Penry v. Lynaugh, 492 U.S. 302 (1989) (*Penry I*) ..... 5, *passim*

Penry v. Johnson, 532 U.S. 782 (2001) (*Penry II*) ..... 9, *passim*

Smith v. Dretke, 124 S. Ct. 46 (2003) 10

Tennard v. Dretke, 124 S. Ct. 383 (2003) 10

Tennard v. Dretke. 542 U.S. ---, 124 S. Ct. 2059 (2004) ..... 10, *passim*

State Cases

Ex Parte LaRoyce Lathair Smith, 123 S.W. 3d 407 (Tex. Crim. App. 2004) ..... 1, *passim*

Smith v. State, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpub.decision) 2, 9

Ex Parte Smith, 1998 Tex. Crim. App. LEXIS 94 2

Ex Parte Smith, 977 S.W. 2d 310 (Tex. Crim. App. 1998) 2

Federal Constitutions, Statutes, and Rules

28 U.S.C. § 1257(a) 1

Rule 13.1 of the Rules of the Supreme Court of the United States 1

State Statutes and Rules

TEX. CODE CRIM. PROC. ANN., ART. 37.071(2)(e)(1) (Vernon 2003). 16

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner LaRoyce Lathair Smith respectfully requests that the Court grant a writ of certiorari to review the decision of the Texas Court of Criminal Appeals in his capital proceeding.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). It is attached hereto as Appendix 1.

JURISDICTION

On April 21, 2004, the Texas Court of Criminal Appeals issued its opinion denying Mr. Smith's application for a writ of habeas corpus. *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

COURSE OF PROCEEDINGS BELOW

LaRoyce Lathair Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June, 1991. The Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence in June, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpublished decision), *cert. denied*, 514 U.S. 1112 (1995). This decision denying Mr. Smith's direct appeal is attached as Appendix 2. Thereafter, Mr. Smith sought habeas corpus relief in the state courts. His first application for state habeas relief was dismissed as untimely, first in April, 1998, *Ex Parte Smith*, 1998 Tex. Crim. App. LEXIS 94, and finally in July, 1998, *Ex Parte Smith*, 977 S.W. 2d 310 (Tex. Crim. App. 1998). The Texas Court of Criminal Appeals subsequently authorized the filing of a subsequent application for habeas relief, and Mr. Smith again filed for habeas relief in the instant case in March, 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the Texas Court of Criminal Appeal adopted that recommendation in *Ex Parte LaRoyce Lathair Smith*, 123 S.W. 3d 407 (Tex. Crim. App. 2004). It is that opinion denying state habeas relief that is before this Court.

STATEMENT OF THE CASE

A. Guilt-Innocence Phase of Mr. Smith's Trial

The guilt phase evidence established that Mr. Smith and his accomplices entered a Taco Bell restaurant with the intention of stealing money and that the store manager, Jennifer Soto, was killed in the course of that crime. Mr. Smith was convicted of the capital murder of Jennifer Soto.

Some critical mitigating evidence concerning Mr. Smith's mental deficiencies and difficult family background was introduced during the guilt phase of Mr. Smith's trial. Johnnie Mae Smith, Mr. Smith's mother, testified that Mr. Smith was a slow learner in school and underwent a great deal of testing. SF 28:129, 130.[1] He failed first grade and was in special education programs throughout school. SF 28:130. By the age of 18, Mr. Smith had reached only the 9th grade. SF 29:34. The crime was committed when Mr. Smith was 19 years old. SF 29:21.

Johnnie Mae Smith also testified about Mr. Smith's father, Leroy Smith. Leroy Smith had been to the penitentiary for robbery. SF 28:126. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. SF 28:134-135. Leroy Smith stole from his family to support his drug habit, SF 28:135-137, and this situation greatly disturbed all of the members of the family, including LaRoyce Smith. SF 28:138.

[1] References to the trial transcript, in Texas called the "statement of facts," are "SF" followed by the volume and page number of the statement of facts.

B. Penalty Phase of Mr. Smith's Trial

1. Testimony

The defense offered additional evidence of Smith's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pringle, records coordinator for the special education department for the Dallas Independent School District, testified that Mr. Smith had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. SF 32:17-42. Testing through the school district indicated that Mr. Smith's verbal I.Q. was 75 and full scale I.Q. was 78. SF. 32:33-34. A report prepared by Richard Adams, the director of health services for the Dallas independent School District, SF 32:23, concluded on the basis of Mr. Smith's history and physical exam that Mr. Smith's learning problems were possibly organic in nature. SF 32:28.

Various family and community members confirmed the turbulent home life caused by Mr. Smith's father. Reverend Samuel Nicks, Mr. Smith's pastor, testified that he was aware that Mr. Smith's father had stolen from his family to support his drug habit. SF 32:10-11. He also testified that such behavior has an especially devastating impact on adolescent children. SF. 32:11. Dorothy Faye Ellis, a good friend of the family, testified that Mr. Smith's family situation affected him greatly, especially the economic hardship wrought by his father's thefts. SF. 32:92-93.

2. Sentencing Instructions

Mr. Smith's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*):

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The jurors were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence -- including evidence with "no relationship to any of the Special Issues" -- led them to conclude "that the death penalty should not be imposed." The full nullification charge was as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death,

then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

These instructions are attached as Appendix 3.

During the closing arguments on the punishment phase, the prosecution emphasized the jurors' obligation to answer the special issues truthfully. Reminding the jurors of voir dire, the prosecution insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about – and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

SF 33:20.

On voir dire, the prosecution repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence – life or death. For example, in the voir dire of Lynn Bartholomew, who served on Mr. Smith's jury, the prosecution wanted to ensure that she would not engage in any sort of nullification in answering the two special issues:

> Q. You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts

> determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, 'Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result regardless of the facts.' What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?
>
> A. Yes, I do.
>
> Q. Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.
>
> A. I think I could.

SF 20:184-85.[2]

The jury verdict form did not include any mention of mitigating evidence, or of the ability of jurors to change their answers on the basis of such evidence, and asked only for answers to the two special issues:

[2]After this colloquy, defense counsel appeared to recognize the tension between the nullification instruction, which invited jurors to answer the special issues dishonestly in order to give effect to mitigating evidence, and the prosecution's anti-nullification comments, which told jurors not to answer the questions untruthfully to achieve a particular result. Accordingly, he sought to reassure Lynn Bartholomew that she could "change" one of her answers without truly "cheating or lying":

> Q. . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence – that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances – if you felt that he shouldn't die, then you're authorized – actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?
> A. No.
> Q. Okay. I mean, it's not like you're cheating or lying or doing something –
> A. No.

SF 20:205.

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

The jury verdict form is attached as Appendix 4. The jury answered both issues affirmatively, and Mr. Smith was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

On direct appeal, Mr. Smith raised a claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) *(Penry I)*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide an adequate vehicle for giving effect to his mitigating evidence of low intelligence and turbulent family background. The Texas Court of Criminal Appeals rejected this claim in an unpublished opinion without

discussion, relying on a previous decision that found a similar nullification instruction to be sufficient. *Smith v. State*, No. 71,333, at 11 (Tex. Crim. App. June 22, 1994) (unpublished decision), *cert. denied*, 514 U.S. 1112 (1995) (citing *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)).

In this state habeas proceedings, Mr. Smith again sought relief under *Penry I*, and the trial court recommended that the claim be denied. The trial court recommended that the claim not be entertained because it had been addressed on direct appeal; the trial court also concluded that Mr. Smith's mitigating evidence did not necessitate a supplemental instruction under the decisions of the Texas Court of Criminal Appeals.

Before the Texas Court of Criminal Appeals acted on the trial court's recommendation, this Court announced its opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry II*, this Court held, as in *Penry I*, that the special issues did not provide an adequate vehicle for the jury to give effect to the defendant's mitigating evidence. More particularly, this Court found in *Penry II* that the *Penry I* problem was not cured by additionally instructing jurors to answer the special issues dishonestly if they believed that mitigating evidence justified a sentence less than death. 532 U.S. at 796-804. In light of this Court's intervening decision in *Penry II*, the parties filed supplemental briefing on Mr. Smith's claim regarding the adequacy of the special issues and the supplemental nullification instruction to facilitate consideration of his mitigating evidence. The matter was argued to the Texas Court of Criminal Appeals on March 22, 2002, with the oral argument focused entirely on whether *Penry I* and *Penry II* required state habeas relief for Mr. Smith.

After oral argument in the Texas Court of Criminal Appeals but before that court issued its ruling in this case, this Court granted certiorari in two cases involving the adequacy of the Texas special issues to facilitate consideration of mitigating evidence. *Smith v. Dretke*, 124 S. Ct. 46 (2003),[3] and *Tennard v. Dretke*, 124 S. Ct. 383 (2003). Although both of these cases potentially bore on the appropriate resolution of Mr. Smith's claims,[4] the Texas Court of Criminal Appeals issued its opinion just before this Court issued its decision in *Tennard v. Dretke*. 542 U.S. ---, 124 S. Ct. 2059 (2004).[5]

The Texas Court of Criminal Appeals concluded that Mr. Smith's evidence of cognitive deficits and a turbulent childhood did not require a supplemental instruction under *Penry I*. The Texas Court of Criminal Appeals maintained that Mr. Smith had failed to establish the presence of a "severe and permanent disability," *Smith*, 132 S.W.3d at 414, and that he had "offered no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Id.* In this respect, the Texas

[3] Although the caption in the case is "*Smith v. Dretke*," the defendant's real name in that case is Robert McBride and is in no way connected to LaRoyce Lathair Smith.

[4] The question presented in *Smith v. Dretke* read:

> Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a 'uniquely severe permanent handicap' in order for a Texas capital murder defendant to claim that the use of a 'nullification' instruction was improper?

The first question presented in *Tennard v. Dretke* read:

> Is the Fifth Circuit's rule requiring a 'nexus' to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

[5] 542 U.S. ---, 124 S. Ct. 2059 (2004). *Smith v. Dretke* was dismissed as moot pursuant to Rule 46.1 (agreement of the parties) after the sentence of the petitioner (Robert McBride) was commuted to life imprisonment. 124 S. Ct. 1652 (2004).

Court of Criminal Appeals fully embraced the test that was emphatically rejected by this Court's recent intervening decision in *Tennard*.[6] According to the Texas Court of Criminal Appeals, without a "*prima facie* showing of a severe and permanent handicap, not of his own making, which is at least related to the commission of the capital offense," a defendant cannot pursue a claim challenging the failure of the special issues to provide a vehicle for the consideration of mitigating evidence.

In addition, the Texas Court of Criminal Appeals asserted without discussion that the mitigating qualities of Mr. Smith's cognitive limitations could be adequately addressed via the deliberateness special issue. *Smith*, 132 S.W.3d at 414-415. ("[a]pplicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder"). The court also maintained that Mr. Smith's troubled background and low intelligence might not necessarily require an affirmative finding to the dangerousness special issue on the theory that Mr. Smith might be able to learn from his mistakes. *Id.* at 415.

The Texas Court of Criminal Appeals also purported to distinguish the nullification instruction given in Mr. Smith's case from the instruction rejected as inadequate by this Court in *Penry II*. According to the Texas Court of Criminal Appeals, the instruction in Smith's case unequivocally informed jurors of their power and duty to nullify. The court stated:

> These instructions expressly authorized and required the jury to answer 'No' to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating

[6] 524 U.S. at --- ("We hold that the Fifth Circuit's 'uniquely severe permanent handicap' and 'nexus' tests are incorrect, and we reject them.").

circumstances. The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues.

Smith, 132 S.W.3d at 416 (footnote omitted).

Although the Texas Court of Criminal Appeals was unanimous in denying relief, four of the nine judges rejected the court's effort to distinguish *Penry II*. Judge Hervey agreed with the majority that Mr. Smith's evidence was not problematic under *Penry I*,[7] but insisted that "the 'nullification' instruction would, as a matter of federal constitutional law, suffer from the same defect as the one in *Penry II* had applicant presented any mitigating evidence that was beyond 'the effective reach of the sentencer.'" *Smith*, 132 S.W.3d at 425 (Hervey, J., joined by Keasler, J., concurring). Judge Holcomb concluded that Mr. Smith's evidence did require an additional instruction under *Penry I* because evidence of his troubled background reduced his moral culpability and yet "could only be aggravating" under the future dangerousness special issue. *Id.* at 431 (Holcomb, J., joined by Price, J., concurring). He also insisted that the nullification instruction was not meaningfully different from the instruction found constitutionally inadequate in *Penry II*. In particular, Judge Holcomb rejected the majority's contention that an explicit invitation to jurors to change their answers to the special issues was sufficient to meet the Court's concerns in *Penry II*:

> Unlike the majority, I do not find that the nullification instruction Smith received is significantly distinguishable from the one reviewed by the Supreme Court in *Penry II*. None of the differences between the instructions in *Penry II* and the instant case alter the fundamental aspects of the vehicle that was provided to the jury in an attempt to allow the jury to consider and give effect to the defendants' mitigating evidence. This vehicle, not merely the description of it, was at the heart of the Supreme Court's reasoning in determining that the instruction in *Penry II* was insufficient. The Supreme Court made this clear by assuming the jury could have understood that the instructions operated in the manner the State argued: by allowing the jury to change to a negative its answer to one of the special issues based on something other than what the question asked. Therefore, providing the same vehicle in more explicit terms does not overcome the defects identified in *Penry II*.

Smith, 132 S.W.3d at 423 (Holcomb, J., joined by Price, J., concurring). (footnotes omitted).[8]

[7] Judge Hervey also would have found Mr. Smith's claim unpreserved under state law. *Smith*, 132 S.W.3d at 423 (Hervey, J., concurring). The majority decision, however, applied no procedural bar and resolved the matter entirely on the merits of Mr. Smith's federal constitutional claim.

REASONS FOR GRANTING CERTIORARI

I. MR. SMITH'S EVIDENCE OF LIMITED MENTAL ABILITIES AND HIS TURBULENT BACKGROUND COULD NOT BE GIVEN ADEQUATE MITIGATING EFFECT VIA THE OLD TEXAS SPECIAL ISSUES AND THE TEXAS COURT OF CRIMINAL APPEALS' CONTRARY CONCLUSION IS WHOLLY UNDERCUT BY THIS COURT'S SUBSEQUENT DECISION IN *TENNARD V. DRETKE*, 542 U.S. —, 124 S. CT. 2059 (2004).

The mitigating evidence in this case is remarkably similar to the evidence in both the *Penry* litigation and *Tennard v. Dretke*. As in *Penry* and *Tennard*, Mr. Smith offered substantial evidence of cognitive impairment and documented his impairment via extensive records and testimony. Like Penry, Mr. Smith also introduced evidence of a difficult and abusive family situation and background. Mr. Smith's evidence tended to reduce his moral culpability, yet the former special issues in the Texas scheme offered no vehicle for jurors to consider and give effect to such evidence. In fact, the very facts that reduced Mr. Smith's moral culpability – his limited intelligence and turbulent background – supported rather than undermined

[8] Judge Holcomb, like Judge Hervey, would have rejected Mr. Smith's claim on procedural grounds, see supra note 8, notwithstanding the majority's unwillingness to impose any procedural barrier to Mr. Smith's claim.

affirmative answers to the deliberateness and dangerousness questions. In this respect, Mr. Smith's evidence was "double-edged" and actually undercut the jurors' ability to truthfully answer the special issues so as to produce a sentence less than death.

The Texas Court of Criminal Appeals, invoking the test developed in the Fifth Circuit Court of Appeals,[9] dismissed Mr. Smith's mitigating evidence because it did not amount to a "severe and permanent handicap," *Smith*, 132 S.W.3d at 415, and Mr. Smith failed to establish an appropriate "evidentiary link" between his evidence and his crime. *Id.* at 414. In *Tennard*, this Court rejected precisely this reasoning, declaring that "[t]he Fifth Circuit's test has no foundation in the decisions of this Court." 542 U.S. at --- (slip op. at 9). Mitigating evidence need not reach a severity threshold to require a vehicle for jurors' consideration. As this Court said in *Tennard*, "the question is simply whether the evidence is of such a character that might serve as a basis for a sentence less than death." 542 U.S. at --- (slip op. at 12) (internal citation marks and citation omitted). Moreover, a defendant need not establish any sort of evidentiary link between his low intelligence and the crime in order for jurors to be able to give effect to its mitigating qualities. Again, in *Tennard*, this Court explicitly rejected this sort of reasoning, stating that it would not "countenance the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime." 542 U.S. at --- (slip op. at 13).

---

[9] *Smith*, 132 S.W.3d at 413 ("For more than ten years, the Fifth Circuit has drawn the line between *Penry* and non-*Penry* mitigation evidence under the test of whether the defendant's criminal act was 'due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own.'") (quoting *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003)).

In addition, the Texas Court of Criminal Appeals' bare assertion that Mr. Smith's low intelligence could be given adequate effect through the deliberateness special issue cannot be squared with *Tennard*. Speaking of Tennard's evidence of low intelligence, this Court declared that "[t]he relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately." 542 U.S. at — (slip op. at 14).

At the same time, the Texas Court of Criminal Appeals offered no plausible way in which Mr. Smith's mitigating evidence would render him less dangerous so as to support a negative answer to the second special issue. Instead, the court emphasized that Penry's disabilities were more severe than Mr. Smith's and that Mr. Smith might be able to control his impulses in the future. *Smith*, 132 S.W.3d at 415. At most, though, this sort of reasoning suggests that Mr. Smith's evidence might not *require* an affirmative answer to the second special issue; it in no way suggests that the second special issue would provide an appropriate vehicle for responding to the mitigating qualities of Mr. Smith's evidence – that the jury could regard such evidence as a basis for concluding that Mr. Smith would *not* be a danger. Indeed, the Texas Criminal Court of Appeals concluded that Mr. Smith's mitigating evidence might simply be irrelevant to the second special issue: "There is no evidence that applicant was unable to learn from experience or unable to control his conduct, with or without his disabilities." *Id.* Accordingly, the second special issue did not provide a vehicle for jurors to give effect to Mr. Smith's mitigating evidence, even if it is possible that jurors

might have concluded, *for reasons unrelated to his disabilities*, that Mr. Smith would not be a danger in the future.

Overall, the Texas Court of Criminal Appeals' conclusion that Mr. Smith's evidence was not problematic under *Penry I* cannot withstand this Court's intervening decision in *Tennard*.

II THE NULLIFICATION INSTRUCTION IN MR. SMITH'S CASE WAS INDISTINGUISHABLE FROM THE INSTRUCTION CONDEMNED IN *PENRY V. JOHNSON*, 532 U.S. 782 (2001) (*PENRY II*) AND THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO CREDIT THIS COURT'S ARGUMENTS IN *PENRY II* REQUIRES THIS COURT'S INTERVENTION.

Mr. Smith trial occurred during the interval between this Court's decision in *Penry I* and the modification of the Texas statute to allow for consideration of mitigating evidence unrelated to the special issues.[10] In addition to the two special issues on deliberateness and dangerousness, the trial court also instructed the jurors that they should answer at least one of the special issues "No" if they believed that the death penalty should not be imposed due to the mitigating evidence presented even if the evidence had "no relationship to any of the Special Issues."[11] Thus, the jurors were compelled to act dishonestly in order to give effect to mitigating evidence. If they believed that the "true" answers to deliberateness and dangerousness were "Yes" but also believed that the defendant should not receive the death penalty because of mitigating evidence with "no relationship to any of the Special Issues," they were required to give a false answer "No" to one of the questions. In addition, as in *Penry II*, the verdict form given to the jurors made no mention of mitigating evidence or the nullification instruction, but simply asked the jurors to answer the special issue questions on deliberateness and dangerousness.[12]

This Court unequivocally declared in *Penry II* that instructing jurors to answer one of the special issues falsely to give effect to mitigating evidence "inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependent on their willingness' to elevate the supplemental instruction over the verdict form instructions. 532 U.S. 782, 800 (quoting *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976)).

---

[10] The new statute includes a "catch-all" special issue, asking "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence by imposed." TEX. CODE CRIM. PROC. ANN., ART. 37.071(2)(e)(1)(Vernon 2003).

[11] The full instruction, attached as Appendix 3, was as follows:

> You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability, or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.
>
> In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

[12] The jury verdict form is attached as Appendix 4.

A bare majority of the Texas Court of Criminal Appeals nonetheless purported to distinguish the instruction given in this case from the instruction given in *Penry II*.[13] According to the Texas Court of Criminal Appeals, the saving grace of the instruction in this case was that it more clearly informed jurors of their power to nullify than did the instruction in *Penry II*. According to the court " the trial court's instructions clearly informed the jury that the mitigation evidence 'trumped' the special issues." *Smith*, 132 S.W.3d at 416. In *Penry II*, though, the State made the same argument about the nullification instruction – that it clearly conveyed the jury's power to nullify their answers to the special issues to give effect to mitigating evidence.[14] This Court assumed for the sake of argument that the nullification instruction was clear in this regard, but still rejected the instruction because it put jurors in the "logically and ethically impossible" position of choosing whether to answer the special issues honestly or follow the nullification instruction. 532 U.S. at 799.

[13] The nullification instruction in *Penry II* was as follows:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal moral culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. See. 532 U.S. at 789-90.

[14] See 532 U.S. at 798 ("Alternatively, the State urges, it is possible to understand the supplemental instruction as informing the jury that it could 'simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence . . . appropriate . . . regardless of its initial answers to the questions.'") (quoting Brief for Respondent).

At the core of this Court's opinion in *Penry II* was the principle that jurors should not have to answer questions dishonestly to give effect to mitigating evidence. The Texas Court of Criminal Appeals' opinion unpersuasively suggests that jurors were not confronted with this dilemma in Mr. Smith's case because the jurors were very clearly instructed to lie: "[t]he instruction did not instruct the jury to violate their oaths or answer either of the special issues 'falsely,' but rather to answer the special issues honestly in light of both the question itself *and* the defendant's mitigating evidence which, as the trial court clearly informed the jury, might or might not have direct relevance to those specific issues." *Smith*, 132 S.W.3d at 416, n33.[15] It is hard to fathom what the court means by answering the issues "honestly" in light of evidence that has no relevance to the issues. If the jurors believed that the state had established deliberateness and dangerousness beyond a reasonable doubt, the only means for the jury to give effect to Mr. Smith's mitigating evidence was to falsely answer that the state had not done so.

Moreover, the logical and ethical dilemma wrought by the nullification instruction was intensified in this case by the prosecution's effort to counter its effects. During voir dire, the prosecution secured the jurors promise to "let the facts determine" the answers to the special issues and not to "answer them to get a desired result." See, e.g., SF 20:184-85 (voir dire of Lynn Bartholomew). The prosecution again reminded jurors of this promise during closing argument, insisting that if the prosecution proved "that the

[15] It is telling that the Texas Court of Criminal Appeals finds support for this sort of argument not in the majority opinion of *Penry II* but in the dissent. *See Smith*, 132 S.W.3d at 416, n.33 (citing 532 U.S. at 806-07 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (invoking dissenting opinion in *Penry II* as support for proposition that clear nullification commands would satisfy the Constitution).

answers to those special issues should be yes" that the jurors must answer them accordingly. SF 33:20. If a nullification instruction by itself injects arbitrariness and capriciousness in a capital trial, a nullification instruction accompanied by an "anti-nullification" command surely cannot satisfy constitutional requirements.

Overall, the grounds on which the Texas Court of Criminal Appeals denied relief in this case were explicitly considered and rejected in *Penry II* and the court's contrary conclusion implicitly challenges this Court's authoritative constitutional interpretive role.[16] If this Court believes that there is a plausible ground for parsing different nullification instructions in the Texas capital context, this Court should grant certiorari to resolve the confusion evident in the closely divided opinion in the Texas Court of Criminal Appeals. If, on the other hand, this Court regards the Texas Court of Criminal Appeals decision as irreconcilable with the letter and spirit of *Penry II*, this Court should summarily reverse the decision below to give full effect to its constitutional judgment.

[16] One of the concurring opinions in the Texas Court of Criminal Appeals appeared to remark precisely on this question of the Texas court's obligation to acquiesce in this Court's decisions: "[f]inally having decided that no federal constitutional violation occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." *But see Penry II*, 121 S. Ct. at 1922-23." *Smith*, 132 S.W.3d at 427 (Hervey, J., joined by Keasler, J., concurring).

CONCLUSION

For these reasons, this Court should grant certiorari to ensure compliance with its decisions in *Penry I* and *Penry II*. Because of the unusual posture of this case and this Court's recent extensive efforts to clarify the Eighth Amendment rights at stake in the Texas capital sentencing context, this Court should issue a summary decision reversing the decision of the Texas Court of Criminal Appeals. In the alternative, this Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

Jordan Steiker *
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1346
(512) 471-6988

Member of the Supreme Court Bar

Maurie Levin
Virginia Capital Representation
Resource Center
2421 Ivy Road
Suite 301
Charlottesville, Virginia 22903
(434) 817-2970

Member of the Supreme Court Bar

* Counsel of Record

Attorneys for LaRoyce Lathair Smith